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Supreme Court, U.S.
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No. 04-488

In the Supreme Court of the United States

REBECCA CRYSTIAN, et al
Petitioners,

v.

TOWER LOAN OF MISSISSIPPI INC., et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question before the Court is not whether this class was properly certified under Fed.R.Civ.P. 23(b)(2), but whether the class was properly certified under Fed.R.Civ.P. 23(b)(1)(A).

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES iii

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....3

Injunctive Relief Predominates the Settlement.....3

"High Dollar" Claims Are Not Released by the Settlement.....5

Predatory lending cases are no longer "high dollar" cases in Mississippi.....6

Some of the Claims Asserted by the Objectors Simply Are Not Viable Claims.....10

Between sixty and eighty thousand individuals will benefit from the injunctive relief provided.....13

CONCLUSION.....14

TABLE OF AUTHORITIES

CASES PAGE

Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998).....1,2

American Bankers Ins. Co. of Fla. V. Wells,
819 So. 2d 1196 (Miss. Dec. 6, 2001).....10

Bolin v. Sears, Roebuck & Co.,
231 F .3d 970 (5th Cir. 2000).....13

Burley v. Homeowners Warranty Corp.,
773 F.Supp. 844 (S.D. Miss. 1990).....6,7

Carson v. American Brands, Inc.,
450 U.S. 79, 88, n. 14 (1981).....6

Carter v. Union Security Life Ins. Co.,
148 F. Supp. 2d 734.....8

Cherry v. Anthony, Gibbs, Sage,
501 So.2d 416 (Miss. 1987).....8

Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.,
584 So. 2d 1254, 1257 (Miss. 1991).....12

Hendricks v. James,
421 So.2d 1031 (Miss. 1982).....6

Hopewell Enters., Inc. v. Trustmark National Bank,
680 So.2d 812 (Miss. 1996).....6

Howard v. Citifinancial,
195 F. Supp. 2d 811.....6

Johnson v. Citifinancial, Inc.,
2003 WL 345347 9

Nelson Radio & Supply Co. v. Motorola, Inc.
200 F .2d 911 (1952).....7

Phillips Petroleum Co. v. Shutts,
472 U.S. 797, 809 (1985).....2

Ross v. Citifinancial,
2002 WL 461567.....6

Strong v. First Family Financial Services, Inc.,
202 F. Supp. 2d 536.....8

Wetzel v. Liberty Mut. Ins. Co.,
508 F.2d 239, 253 (3d Cir. 1975).....13

STATUTES AND RULES

Fed.R.Civ.P.
23(b)(2).....1,2,3,13,14

FedR.Civ.P.
23(b)(1)(A).....1,2,3,14

Mississippi Code § 83-53-23.....11

Mississippi Code § 75-17-21.....11

I. INTRODUCTION

Petitioners ask the Court to accept certiorari on the certification and settlement of a class action upon which the Fifth Circuit did not publish an opinion when originally issued and denied a motion requesting publication. The Fifth Circuit ruled that the district court did not abuse its discretion when it certified the Tower Loan class under Fed.R.Civ.P. 23(b)(1)(A). Because the district court did not abuse its discretion in certifying the class under Fed.R.Civ.P. 23(b)(1)(A), the Fifth Circuit did not address the propriety of the district court's alternative certification under Fed.R.Civ.P. 23(b)(2). The Fifth Circuit further found that the district judge did not abuse his discretion when he approved the terms of the settlement. Petitioners herein (objectors below) asked for *en banc* consideration. Not one member of the Fifth Circuit voted for en banc consideration.

This case is a "negative value" case which presents a paradigm for Rule 23(b)(2) class certification. Tower Loan customers were the victims of "predatory lending" practices, for which they sought redress. The complaint alleged that Tower Loan was guilty of "packing" borrowers loans with insurance products and that Tower was further guilty of "flipping" loans so as to cause the borrower to pay excessive interest and insurance premiums. The monetary damages typically resulting from "predatory lending" cases in Mississippi are small.

In ruling on class certification, the lower court, as well as the Fifth Circuit, applied the standard set out in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). In *Allison* the Fifth Circuit held that Rule 23(b)(2)

class certification was justified when plaintiffs' claims for injunctive relief predominated over ancillary claims for monetary reimbursement. The lower court correctly held that in this case,

> Cole seeks the restitution and disgorgement by defendants of the insurance premiums and related charges allegedly unlawfully collected. As such, the demand is not in the nature of damages, but is instead an extension of the equitable remedy. . . . Rule 23(b)(2) is readily applicable.

Memorandum Opinion p. 7-8.

In *Allison* the Fifth Circuit recognized that the existence of a negative value suit is the "most compelling rationale" for certifying a class action. *Allison*, 151 F.3d at 420. As this Court explained, a negative value suit is one in which class members' claims "would be uneconomical to litigate individually. For example, in *Shutts*, the claims averaged about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985).

In sum, contrary to the assertions contained within the petition, the class was properly certified under Fed.R.Civ.P. 23(b)(1)(A), and alternatively certified under Fed.R.Civ.P. 23(b)(2). Because the case was alternative certified under both subsections of Rule 23, any conflict among the courts of appeals about the correct standard for Rule 23(b)(2) class certification would be moot. Accordingly, the petition should be denied.

II.. STATEMENT OF THE CASE

The Fifth Circuit held that the district court did not abuse its discretion when it certified a mandatory class under Fed.R.Civ.P. 23(b)(1)(A). The district court, however, alternatively certified this case under Fed.R.Civ.P. 23(b)(2).

Prior to class certification, numerous claims had already been filed which requested injunctive relief seeking to modify Tower's business practices. A very real possibility of inconsistent adjudications existed had these individual cases been allowed to proceed.

Injunctive Relief Predominates the Settlement.

The second amended complaint filed against Tower Loan requested equitable relief, including:

> (a) A Court determination that the defendant, Tower, has violated the terms of that certain Consent Decree with the Federal Trade Commission, which required the defendant to include credit life and credit disability insurance charges as finance charges on the Truth in Lending Statements furnished to its borrowers who were charged for Credit Life and Credit Disability Insurance.
>
> (b) A Court determination of the rights of plaintiffs and the Class and corresponding rights of defendants.
>
> (c) An order enjoining defendants from engaging in further unfair, misleading and deceptive practices regarding the manner in which it procures and places credit life, credit disability and property insurance on the plaintiffs and Class Members, as well as future borrowers.

(d) A Court Order requiring defendant to refund to plaintiffs and all Class Members all premiums and related charges made to defendant or its agents.

(e) A Court Order requiring the defendant to cease and desist from violating Section 75-67-121 of Mississippi Code by charging premiums not in keeping with that usually and customarily paid for like insurance.

(f) A Court Order requiring the defendant to cease and desist from violating Section 83-5-35 by engaging in Unfair Competition and Practices, by making publishing and disseminating to the public false and misleading statements concerning the availability of loans; the terms of the loans; the costs of said loans, and the collateral to be taken for said loans.

(g) A Court Order requiring the defendants to inform all borrowers of the ownership, financial connection, and sharing of the borrowers' premiums for all insurance charged by the defendant, Tower.

(h) A Court Order requiring the defendants to terminate all "packing" of credit life, credit disability and property insurance unless and until the proposed plan is submitted to and approved by the Court.

(i) A Court Order requiring the defendants to allow property insurance claims to be filed and adjusted without requiring the borrower to obtain an appraisal.

(j) A Court Order establishing a fair method by which the borrowers have the option to file credit insurance claims directly with the insurance company.

The settlement reached by the parties provides primarily injunctive relief. The injunctive relief set forth in the Judgment will change the way Tower Loan does business. The new practices and procedures provide for greater benefit to the Class than the ancillary monetary damage.

"High Dollar" Claims Are Not Released by the Settlement.

Some of the issues presented by the Petitioners simply are not claims which are addressed by the Second Amended Complaint or the language of the Release approved by the Court.

Petitioners claim that they should be allowed to pursue their predatory lending claims against Tower on an individual basis. Basically, Petitioners claim that Tower forced them to buy credit life and credit disability insurance in order to obtain a loan from Tower; and forced them to buy property insurance for items which would have been covered by their homeowner's policy. Petitioners also claim that they were never informed that the purchase of credit insurance was optional. These type cases are commonly referred to "flipping," "packing" and "churning" cases.

Likewise, Class Counsel believes that Tower entered into a pattern, practice, design and scheme to force its borrowers to purchase insurance from an insurance company affiliated with Tower. The percentage of borrowers who purchased credit insurance bears out this belief. One question to be considered is the value of a predatory lending case in Mississippi.

Predatory lending cases are no longer "high dollar" cases in Mississippi.

"Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. . . They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, n. 14 (1981) (Citations omitted.) As the course of this litigation has demonstrated, the merits of the case are hotly disputed.

When this case was originally filed, there were few, if any, reported decisions on "flipping," and "packing" cases. Since that time, many cases have been filed, and some decisions have been reported.

In March of 2002, two opinions were rendered by Judge Barbour of the Southern District of Mississippi. Those opinions are *Howard v. Citifinancial*, 195 F. Supp. 2d 811 and *Ross v. Citifinancial*, 2002 WL 461567. In these two opinions, the Court addressed most of the issues raised by Plaintiffs' Complaint.

In the Ross case, Judge Barbour ruled that as a matter of Mississippi law, no fiduciary relationship existed between the individual Defendants and the Plaintiffs. In coming to this conclusion, the Court discussed the cases of *Hopewell Enters., Inc. v. Trustmark National Bank*, 680 So.2d 812 (Miss. 1996); *Hendricks v. James*, 421 So.2d 1031 (Miss. 1982); and *Burley v. Homeowners Warranty Corp.*, 773 F.Supp. 844 (S.D. Miss. 1990).

Judge Barbour also ruled that as a matter of law, the Plaintiffs could not prevail on their claims of breach of the implied duty of good faith and fair dealing. In so holding, he based his opinion, at least in part, on *Burley v. Homeowners Warranty Corp.*, 773 F.Supp. 844.

In finding that the Plaintiffs could not prevail on their civil conspiracy claims, Judge Barbour quoted from the Fifth Circuit ruling in the case of *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (1952), which held:

> [i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Class Representatives herein also advanced a Civil Conspiracy claim. Class Representatives have taken issue with the fact that Tower and American Federated share common ownership. When arguing civil conspiracy, Class Counsel recalls the District Court posing the question with whom Tower was supposed to conspire. This question from the District Court put things in perspective regarding the civil conspiracy claim.

In *Nelson* Judge Barbour further opined that since the Court had already ruled that there was no fiduciary relationship between the Plaintiffs and the Defendants, the Plaintiffs' claim for negligence must also fail, and used as its logic that the failure to act where there is no duty to act is not negligence.

Judge Barbour further discussed the statute of limitations in *Nelson* and held that the general three year statute of limitations was applicable to predatory lending cases. He further ruled that the statute of limitations was not tolled in that the Defendants did not fraudulently conceal facts from the Plaintiffs. He based this holding on the cases of *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416 (Miss. 1987) and *Carter v. Union Security Life Ins. Co.*, 148 F.Supp. 2d 734.

Also in March of 2002, District Judge Tom S. Lee issued an opinion in a case styled *Strong v. First Family Financial Services, Inc.*, 202 F. Supp. 2d 536. In that case, Judge Lee ruled that:

> Loan and insurance documents executed by borrowers, that conspicuously and clearly disclosed that credit insurance was not required as condition of borrowers' loans, precluded any reasonable possibility of recovery by borrowers of their claims against lender based on allegations that lender failed to disclose that credit insurance was not required or that lender misrepresented that such insurance was required as condition to obtaining their loans.

Judge Lee also held:

> Under Mississippi law, a person is under an obligation to read a contract before signing it, and as a general rule will not be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract, regardless of whether he actually read the document.

In February of 2003, Judge Barbour again addressed

"flipping" and "packing" cases in the case of *Johnson v. Citifinancial, Inc.*, 2003 WL 345347. In that case, Judge Barbour reaffirmed the Court's position on the statute of limitations applicable to "flipping" and "packing" cases. He also addressed the issue of an arbitration agreement contained within the lender's contract. Many of the lenders doing business in Mississippi have, since the proliferation of "flipping" and "packing" cases, included arbitration clauses in their standard loan contracts. Tower Loan was one of those lenders (R. 1430).

In addressing the arbitration issue, Judge Barbour ruled that the arbitration clause contained within the lender's contract was not unconscionable and that the claims of the parties whose contracts contained arbitration provisions were subject to arbitration. Petitioners have intimated that, generally, claims submitted to arbitration are much less valuable than cases tried in front of a jury.

Tower Loan began including an arbitration provision in its loan contracts in 1997. Class Counsel is not aware of any Court ruling that the Tower arbitration agreement is unconscionable. Therefore, it must be assumed that any claim an individual might make regarding "flipping" and "packing" resulting from a loan made after 1997 would be subject to arbitration. But for the class action, any claim that any individual might assert as the result of its dealings with Tower Loan prior to 1997 may well be barred by the three year statute of limitations. The settlement of this Class Action will provide relief to over a 103,000 individuals whose claims are likely barred by the statue of limitation or whose claims would be subject to arbitration.

The rulings which have followed the filing of the Complaint in this case have not been favorable to the Plaintiffs. In light of these rulings, Class Counsel is of the opinion that the fact that the class definition in this case encompasses persons whose loans were made in 1993 is an excellent result on behalf of the entire class.

Some of the Claims Asserted by the Objectors Simply Are Not Viable Claims.

Petitioners claim that most class members were overcharged for credit insurance. Notably, Petitioners do not allege that they were charged more for insurance than provided for by the rates filed with the Mississippi Insurance Department. There is a good reason for this, they simply were not. The insurer charged the exact amount approved by the Mississippi Insurance Department. This claim by the Petitioners would fall squarely within the filed rate doctrine. As this Court is well aware, the filed rate doctrine provides that the rates filed with and approved by a regulatory agency of the government are practically unassailable. See *American Bankers Ins. Co. of Fla. v. Wells*, 819 So.2d 1196 (Miss. Dec. 6, 2001). The claims made by the Petitioners relating an "overcharge of insurance premiums" simply are not viable and compensable claims.

The Barnes Complaint which was filed in the Circuit Court of Jefferson County, Mississippi contains examples of claims which simply are not viable against Tower (R. 1435). In ¶ 44 of that Complaint, it is alleged that:

> When the Plaintiffs entered into their contracts with Defendant, Tower, for a consumer loan, they reasonably

> believed that if Defendant, Tower, procured credit life, credit disability and property insurance on their behalf, Defendant would procure adequate insurance at the prevailing market rate.

The maximum rates for credit life and credit disability insurance are codified in Mississippi Code § 83-53-23, and after reviewing hundreds of Tower Loan contracts, Class Counsel has yet to find one instance wherein Tower has charged a rate higher than the one allowed for by the statute. Tower charges the maximum, and the maximum rate is outrageous, but it is the rate allowed by law.

Paragraph 44 of the Barnes Complaint continues:

> Additionally, Plaintiffs reasonably believed and had the right to believe, that if Defendant obtained credit life, credit disability and/or property insurance for them, an exorbitant interest rate would not be charged for the insurance premium.

This is another instance where "it oughta be illegal," but it simply is not. The Mississippi Legislature, in its infinite wisdom, has enacted Mississippi Code § 75-17-21, which allows small loan companies to charge up to 36% in interest on small loans. This is loan sharking accomplished with a piece of paper rather than a leg breaker; it is crime in the suites, not crime in the streets, but it is legal.

The Barnes Complaint further alleges that Tower failed to inform its customers of the excessive nature of the insurance premiums and interest rates.

> It is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it. *See Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.,* 584 So.2d 1254, 1257 (Miss. 1991).

The Tower contracts are very clear in showing the customer that he/she is being charged for credit insurance and the interest rate applied to the contract (R. 1430). The "failure to inform" claims simply are not seeing the light of day in these cases.

Petitioners have taken the position that some absent class members who defaulted on their loans due to the exorbitant insurance charges had their personal property repossessed and sold. If there are any such Class Members, Counsel for the Petitioners failed to present any evidence of their existence. The lack of evidence to prove this claim was discussed by the Court on pages 61 and 62 of the Court Memorandum Opinion (R.E. 2399, 2400). The District Court stated:

> Release modification is not warranted for wrongful repossession or foreclosure claims. No objector with any such has been specifically identified. Presumably, the claims postulated by counsel are for allegedly unlawful collection practices and do not challenge the lawfulness of credit insurance placement or charges. Consequently, they would not relate to the allegations of the complaint. Release clarification is not necessary, ***for such claims would not be barred by the release as presently drafted.*** (emphasis added)

If, in fact, there are such Class Members, their claims should have been presented to the Court at the Fairness Hearing. The Court cannot be expected to rule in a vacuum. Petitioners presented no proof upon which the Court could rule for them on this issue.

Between sixty and eighty thousand individuals will benefit from the injunctive relief provided.

It is uncontradicted that between sixty and eighty percent of Tower Loan's customers are repeat borrowers. These repeat borrowers will reap the benefits of the injunctive relief to which Tower Loan has agreed. This number is more than sufficient to justify certification under Rule 23(b)(2).

A Rule 23(b)(2) class was rejected by the Fifth Circuit in *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000) because the record revealed only one class member could benefit from injunctive relief. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000). By contrast, the Third Circuit recognized that not all class members need benefit from injunctive relief, as long as a substantial proportion benefit as was true here. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 253 (3d Cir. 1975).

In sum, between sixty and eighty percent of the borrowers who do business with Tower Loan will borrow from Tower Loan on more than one occasion. Under the settlement agreement, Tower will be prohibited from engaging in the predatory lending practices at issue in the complaint. Providing this type of injunctive relief to sixty to eighty thousand individuals justifies class-wide injunctive relief under Rule 23(b)(2).

CONCLUSION

The Fifth Circuit correctly held that the district court did not abuse its discretion in certifying this class under Fed.R.Civ.P. 23(b)(1)(A), largely because of the probability of inconsistent adjudications by various courts. Because certification under 23(b)(1)(A) was deemed proper, the Fifth Circuit did not even address the question of whether the alternative certification under Fed.R.Civ.P. 23(b)(2) was an abuse of discretion. The District Courts and Courts of Appeals should be given time to narrow the issues and develop solutions for handling "negative value" cases before they are dealt with by Certiorari. Their work is not complete; they continue to search for the most workable solutions. Certiorari should not be granted in this case.

Respectfully submitted,
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